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Tan Kim Ho & Anor v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–21 OF 2007(P) AND 05–22 OF 2007(P)
ZAKI AZMI CJ, ABDUL AZIZ MOHAMAD AND HASHIM YUSOFF FCJJ
17 FEBRUARY 2009

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Criminal Procedure — Defence — Alibi — Whether trial judge misdirected himself in regarding defence as one of alibi — Whether substantial miscarriage of justice occasioned — Whether application of proviso to s 60 of the Courts of Judicature Act 1964 warranted — Courts of Judicature Act 1964 proviso to s 60

D

Criminal Procedure — Trial — Accused's right to remain silent — Whether trial judge erroneously advised appellant

E

Evidence — Identification evidence — Defence of mistaken identity — Whether appellants were correctly identified

F

The two appellants were jointly tried at the High Court for committing offences under the Firearms (Increased Penalties) Act 1971 ('the Act'). These offences were alleged to have been committed on 5 August 1992 at about 2.30am at a pub in Pulau Pinang. At about midnight on the day in question a commotion had arisen between two groups, one group of two persons ('the appellants') and the other of some six young professionals '(the group of six'). In that commotion one of the two appellants sustained an injury above the eyebrow after which the two appellants left the premises. However, at about 2.20am the two appellants returned and approached the group of six who were still in the pub. Thereafter one of the two appellants pulled out a gun and after asking questions of two of the group of six, Ramesh and Edmund, shot Edmund who suffered serious head injuries but did not die. The gunman at the same time ordered the group of six to take out their belongings and position themselves with their knees and heads to the floor. The other appellant collected the wallets and also snatched off the gold necklaces that two of the group of six was wearing. Then another shot was heard causing the death of Ramesh. Thereafter, the gunman who was the first appellant and his accomplice, the second appellant left the scene of the crime. The first appellant was charged under s 3 of the Act for discharging a firearm while committing robbery (a scheduled offence), that led to the death of Ramesh and the injury to Edmund. The second appellant was charged under

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s 3A of the Act, for being in the company of the first appellant with reasonable knowledge that the latter was in possession of a revolver, which he had discharged with the intention of causing death while in the course of robbery. At the trial the first appellant chose to remain silent but the second appellant gave evidence on oath. The second appellant's defence was that he was not inside the pub at the time of the robbery and shooting and that he had been mistakenly identified as the man who was inside the pub then, when it was another by the name of David Goh ('David'). In effect his defence was twofold, namely, alibi and mistaken identity. The trial judge ruled that since the second appellant had not given an alibi notice as required under s 402A of the Criminal Procedure Code his evidence in support of the defence of alibi, that he was outside the pub during the time when the offence was committed, must be excluded. However, the trial judge then went on to consider the second appellant's other defence of mistaken identity, which was that it was David who was in the pub at the time when the offence was committed and that he was mistaken for the second appellant. Having discovered that there existed a person by the name of David and after considering the evidence of the other prosecution witnesses together with the fact that there was no other evidence of David's involvement the trial judge found that the second appellant's allegation of the role played by David was an invention. Both appellants were then convicted and sentenced to death. They appealed to the Court of Appeal. The Court of Appeal concluded that the trial judge had misdirected himself in regarding the second appellant's defence as one of alibi but nevertheless found that there was no substantial miscarriage of justice because the trial judge had considered the second appellant's defence in its entirety and therefore applied the proviso to s 60 of the Courts of Judicature Act 1964 ('CJA') and dismissed the appeal. In this appeal both appellants challenged their identification by the three witnesses. In effect there were two issues to be considered in this appeal. The first issue was whether the trial judge had erroneously advised the first appellant that if he elected to remain silent he may not be deemed guilty and the second was whether the Court of Appeal ought to have resorted to the proviso to s 60 of the CJA after having found that the trial judge had misdirected himself when he held that the defence of the second appellant was one of alibi.

Held, dismissing both appeals and affirming the convictions and sentences imposed against both appellants:

(1) (per **Zaki Azmi CJ**, **Hashim FCJ** and **Abdul Aziz Mohamad FCJ**) As no request or attempt had been made to correct or clarify the notes of evidence in the present case, the notes had to be accepted as correctly recorded by the trial judge and interpreted accordingly. From the notes of evidence and the grounds of judgment, it was clear the first appellant was properly advised on his rights as well as on the effect of choosing

to remain silent. Further, since the appellants were represented by able and experienced counsel the duty to advise the appellant also lay with counsel and not only with the court. Therefore, even if the trial judge had advised the appellant wrongly, counsel as an officer of the court would have definitely advised the trial judge of any errors on this count. In any case, this being a capital charge, the first appellant's decision to remain silent would have been made after consultation with his counsel and it could not be supposed that his counsel did not inform him of the consequences of remaining silent. In addition the first appellant's counsel had confirmed that the first appellant had elected to remain silent not on one occasion but three different occasions during the trial (see paras 20, 22 & 69).

(2) (per **Abdul Aziz Mohamad FCJ**) If the Court of Appeal had recognised that the trial judge had viewed the second appellant's defence as being twofold and that he had, after excluding the evidence in support of the defence of alibi, gone on to consider the second appellant's defence of mistaken identity, there would have been no necessity for it to resort to the proviso to s 60 of the CJA to find that there was no substantial miscarriage. Resort to the proviso would have only been appropriate if the trial judge had, on the basis that the defence was one of alibi, refused to consider the evidence in support of it because it was inadmissible, and had convicted the second appellant by reason that there was no admissible evidence in his defence. However, the trial judge in this case had not done this but instead had gone on to consider the defence of mistaken identity (see paras 50, 52, 53, 56 & 57).

(3) (per **Zaki Azmi CJ** and **Hashim FCJ**) The trial judge, as the Court of Appeal had observed, had not committed any error in the directions that he gave himself on the issue of identification, a question of fact. In dealing with the second appellant's defence of mistaken identity the trial judge had rightly considered that the name David was only first raised during the second appellant's testimony and that the fact that the second appellant was not in the pub at the time when the offence was committed was never raised during the prosecution's case by either of the appellants. In any case since the three prosecution witnesses clearly and confidently identified the first and second appellants the trial judge was right in concluding that the two appellants were correctly identified (see paras 28, 31, 38 & 39).

[Bahasa Malaysia summary

Kedua-dua perayu dibicara secara bersama di Mahkamah Tinggi kerana melakukan kesalahan-kesalahan di bawah Akta Senjata (Penalti Lebih Berat) 1971 (Akta tersebut). Kesalahan-kesalahan itu didakwa dilakukan pada

5 Ogos 1992 pada kira-kira 2.30 pagi di sebuah kelab malam di Pulau Pinang. Lebih kurang pada tengah malam hari kejadian, satu kekecohan berlaku antara dua kumpulan, satu kumpulan terdiri daripada dua orang ('perayu-perayu') dan satu lagi terdiri daripada enam orang profesional muda ('kumpulan enam orang'). Dalam kekecohan itu, salah seorang daripada perayu mengalami kecederaan di bahagian atas alis matanya dan selepas itu mereka meninggalkan kelab tersebut. Tetapi, pada jam 2.20 pagi, kedua-dua perayu kembali ke kelab tersebut dan menghampiri kumpulan enam orang tersebut yang masih ada di situ. Salah seorang perayu kemudiannya mengacukan sepucuk pistol dan setelah bertanya beberapa soalan kepada Ramesh dan Edmund, dua daripada kumpulan enam orang tersebut, menembak Edmund yang mengalami kecederaan serius di kepala tetapi dia tidak mati. Pada masa yang sama, penembak mengarahkan kumpulan enam orang tersebut mengeluarkan barang-barang mereka dan bersujud di lantai. Perayu yang seorang lagi merampas dompet-dompet dan dua rantai emas yang dipakai oleh dua daripada kumpulan enam orang tersebut. Kemudian, satu lagi tembakan kedengaran dan mengakibatkan kematian Ramesh. Penembak tersebut yang merupakan perayu pertama dan rakan sejenayahnya, perayu kedua, melarikan diri dari tempat kejadian jenayah tersebut. Perayu pertama didakwa di bawah s 3 Akta tersebut atas kesalahan melepaskan tembakan daripada senjata api ketika melakukan rompakan (suatu kesalahan berjadual), yang mengakibatkan kematian Ramesh dan mencederakan Edmund. Perayu kedua didakwa di bawah s 3A Akta sebagai rakan sejenayah perayu pertama dengan pengetahuan yang munasabah bahawa perayu pertama memiliki senjata api, dan dia telah melepaskan tembakan dengan niat mengakibatkan pembunuhan semasa merompak. Semasa perbicaraan, perayu pertama memilih untuk berdiam diri tetapi memberi keterangan bersumpah. Pembelaan perayu kedua adalah bahawa dia tidak berada dalam kelab malam tersebut ketika kejadian rompakan dan tembakan berlaku dan dia telah salah dicamkan sebagai lelaki yang berada dalam kelab malam pada ketika itu, sedangkan ia adalah orang lain yang bernama David Goh ('David'). Pada hakikatnya, pembelaannya adalah dua, iaitu, alibi dan salah cam. Hakim bicara memutuskan bahawa memandangkan perayu kedua tidak memberikan notis alibi seperti yang dikehendaki di bawah s 402A Kanun Prosedur Jenayah, keterangannya yang menyokong pembelaan alibi, bahawa dia berada di luar kelab malam ketika kejadian berlaku, tidak boleh diterima. Walau bagaimanapun, hakim bicara mempertimbangkan juga pembelaan perayu kedua yang satu lagi iaitu pembelaan salah cam, yang menyatakan bahawa David yang berada dalam kelab malam semasa kejadian tersebut berlaku dan dia telah disalah anggap sebagai perayu kedua. Setelah mendapati bahawa sememangnya ada seseorang bernama David dan setelah mempertimbangkan keterangan saksi-saksi pendakwa yang lain bersamaan fakta bahawa keterangan lain menunjukkan pembabitan David, hakim bicara memutuskan bahawa dakwaan perayu tentang peranan David adalah rekaan sahaja. Kedua-dua perayu disabitkan kesalahan dan dijatuhkan hukuman

A mati. Mereka merayu ke Mahkamah Rayuan. Mahkamah Rayuan memutuskan bahawa hakim bicara telah salah arah apabila menganggap pembelaan perayu kedua sebagai alibi tetapi bagaimanapun, mendapati tiada salah laksana keadilan yang substansial kerana hakim bicara telah mempertimbangkan pembelaan perayu kedua itu secara keseluruhannya dan
B oleh itu mengguna pakai proviso kepada s 60 Akta Mahkamah Kehakiman 1964 ('AMK') dan menolak rayuan tersebut. Dalam rayuan ini kedua-dua perayu mempersoalkan pengecaman mereka oleh tiga orang saksi. Terdapat dua isu yang perlu dipertimbangkan dalam rayuan ini. Isu pertama ialah sama ada hakim bicara telah salah menasihati perayu pertama bahawa jika memilih
C untuk mendiamkan diri, dia tidak akan dianggap bersalah dan yang keduanya sama ada Mahkamah Rayuan harus mengguna pakai proviso kepada s 60 AMK setelah mendapati hakim bicara telah salah arah apabila dia memutuskan bahawa pembelaan perayu kedua merupakan pembelaan alibi.

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Diputuskan, menolak kedua-dua rayuan dan mengesahkan sabitan dan hukuman yang dikenakan terhadap perayu-perayu:

E (1) (oleh **Zaki Azmi KHN**, **Hashim HMP** dan **Abdul Aziz Mohamad HMP**) Memandangkan tiada permintaan atau percubaan dibuat untuk membetulkan atau menjelaskan nota-nota keterangan dalam kes ini, nota-nota tersebut hendaklah diterima seperti yang telah direkodkan dengan betul oleh hakim bicara dan ditafsirkan dengan sewajarnya.
F Daripada nota-nota keterangan dan alasan-alasan penghakiman, adalah jelas bahawa perayu pertama dinasihatkan dengan betul atas hak-haknya dan juga kesan memilih untuk mendiamkan diri. Selanjutnya, memandangkan perayu-perayu diwakili oleh peguam yang berkebolehan dan berpengalaman, tanggungjawab menasihati
G perayu-perayu juga terletak di tangan peguam dan bukan hanya tanggungjawab mahkamah. Maka, jika hakim bicara memberi nasihat salah kepada perayu, peguam, sebagai pegawai mahkamah tentunya menasihati hakim bicara jika ada kesilapan. Oleh sebab kesalahan ini merupakan pertuduhan hukum bunuh, keputusan perayu pertama
H untuk berdiam diri tentunya dibuat setelah mendapat nasihat daripada peguamnya dan adalah tidak patut mengandaikan bahawa peguamnya tidak memberitahu perayu kesan akibat tindakannya memilih untuk berdiam diri. Tambahan pula, peguam perayu pertama telah mengesahkan bahawa perayu pertama memilih untuk berdiam diri
I bukan hanya sekali, tetapi tiga kali semasa perbicaraan tersebut (lihat perenggan 20, 22 & 69).

(2) (oleh **Abdul Aziz Mohamad HMP**) Jika Mahkamah Rayuan telah mengenal pasti bahawa hakim bicara melihat pembelaan perayu kedua sebagai dua bahagian dan dia telah, selepas tidak mengambilkira

keterangan sokongan kepada pembelaan alibi, terus mempertimbangkan pembelaan perayu kedua berkenaan salah cam, tidak perlulah mahkamah ini mengguna pakai proviso kepada s 60 AMK bagi suatu penemuan salah laksana keadilan yang substansial. Penggunaan proviso tersebut hanya bertepatan jika hakim bicara, atas dasar pembelaan itu merupakan pembelaan alibi, telah enggan mempertimbangkan keterangan sokongan bagi pembelaan itu oleh sebab keterangan tersebut tidak boleh dimasukkan, dan mensabitkan perayu kedua dengan alasan tiada keterangan yang boleh dimasukkan untuk pembelaannya. Walau bagaimanapun, hakim bicara dalam kes ini tidak melakukan perkara yang sebegitu, malah dia telah mempertimbangkan pembelaan salah cam (lihat perenggan 50, 52, 53, 56 & 57).

(3) (oleh **Zaki Azmi KHN** dan **Hashim HMP**) Hakim bicara, seperti yang diteliti oleh Mahkamah Rayuan, tidak melakukan sebarang kesilapan dalam arahannya bagi isu pengecaman, yang merupakan suatu persoalan fakta. Dalam menangani pembelaan salah cam perayu kedua, hakim bicara membuat pertimbangan yang betul apabila memutuskan bahawa nama David hanya pertama kali dibangkitkan semasa testimoni perayu kedua dan isu bahawa perayu kedua tidak berada dalam kelab malam semasa kejadian tersebut berlaku tidak pernah dibangkitkan dalam kes pendakwaan oleh kedua-dua perayu. Apa pun, memandangkan tiga saksi pendakwaan dengan jelas dan pasti mengecam perayu pertama dan kedua, hakim bicara merumuskan dengan tepat bahawa kedua-dua perayu dicam dengan sahih (lihat perenggan 28, 31, 38 & 39).]

Notes

For cases on alibi, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1665–1691.

For cases on identification evidence in general, see 7(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1683–1726.

For cases on trial in general, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4549–5094.

Cases referred to

Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1; [1996] 4 CLJ 597; [1997] 1 AMR 329, FC (refd)

Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265; [1994] 2 CLJ 151, SC (refd)

Lee Ah Seng & Anor v PP [2007] 6 MLJ 1, FC (refd)

Mohamed Salleh v PP [1969] 1 MLJ 104, FC (refd)

Munusamy v PP [1987] 1 MLJ 492, SC (refd)

A *Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh* [1997] 2 MLJ 373; [1997] 3 CLJ 225, CA (refd)
Rondel v Worsley [1969] 1 AC 191, HL (refd)

Legislation referred to

B Courts of Judicature Act 1964 s 60
Criminal Procedure Code ss 180, 272, 402A
Evidence Act 1950 s 114(g)
Firearms (Increased Penalties) Act 1971 ss 3, 3A

C

Appeal from: Criminal Appeal Nos P-05–50 of 1999 and P-05–51 of 1999 (Court of Appeal, Putrajaya)

Jagdeep Singh Deo (Karpal Singh & Co) for the first appellant.
D *Karpal Singh (Jagdeep Singh Deo and Nicholas Netto with him) (Karpal Singh & Co) for the second appellant.*
Wong Chiang Kiat (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

E **Zaki Azmi CJ:**

[1] This case is based purely on the finding of facts by the learned trial judge. There is hardly any new or novel point of law that needs to be considered. The laws that are relevant to the case have all been well established. The finding as to the identity of the appellants which was upheld by the Court of Appeal are really all the facts in issue.

[2] Nevertheless, I looked at and evaluated the evidence again. Below are my findings.

[3] In addition, at this court and not at the courts below, the appellants raised the question whether the trial judge had properly advised the appellants of their rights at the close of the prosecution's case.

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[4] The first appellant in Criminal Appeal No 05–21 of 2007(P) was charged under s 3 of the Firearms (Increased Penalties) Act 1971 for discharging a firearm while committing a scheduled offence ie robbery. It resulted in the death of one M Ramesh s/o M Munisamy and injury to one I Edmund s/o K Ganamuthu. The second appellant in Criminal Appeal No 05–22 of 2007(P) was charged for being in the company of the first appellant with reasonable knowledge that the first appellant was in possession of a revolver and that the first appellant had discharged a firearm with intention of causing death while in the course of robbery (a scheduled offence) and at

the same time causing injury to the person earlier mentioned. These offences were alleged to have been committed on 5 August 1992 at about 2.20am at a pub known as Hot Lips Lounge located at Jalan Pinang, Georgetown, Pulau Pinang.

[5] On that unfortunate night, the witnesses and the deceased had decided to visit the pub because the deceased had completed a major project ('Oleh kerana si mati baru-baru menghabis satu kerja besar …'). That was at about 11.30pm. At about midnight, there was a commotion between two groups of people in the pub. There was an altercation in Chinese. Suddenly the lights came on. Two of those who had been involved in the commotion approached the deceased and his friends. The first appellant questioned the identity of the deceased as well as where he had come from. The first appellant pointed the gun towards Edmund (PW6) and shot him. They were told to take out their wallets and money which they duly complied with and placed them on the table. These wallets and a gold chain were subsequently robbed off them. They were then asked to put their heads on the floor in a prostration position. Then after reloading his gun, the second appellant shot the deceased.

[6] Both the first and second appellants were found guilty and convicted by the High Court. Their appeals to the Court of Appeal were both dismissed.

[7] Both appellants submitted that the trial judge had erroneously directed the accused of their rights at the close of the prosecution's case.

[8] It is to be noted that at the High Court the first appellant was represented by a counsel, different from the one appearing in this court. The second appellant however was represented by the same counsel at all levels.

[9] Counsel for the first appellant at this court contended that at the close of the prosecution's case his client was wrongly advised by the trial judge of his rights. According to him, the judge had erroneously advised the first appellant that if he elects to remain silent, he may not be deemed guilty. Counsel for the second appellant supported this contention for the benefit of his client.

[10] The basis of the first appellant's submission is what appears at p 202 of the record of appeal on 9 March 1999:

> Mahkamah: … *Court also clarifies that (sic) the press reports on the proceeding on the last occasion when all counsel (sic) were present, to effect that the court could deem silence as admission as wholly erroneous (sic) and also inaccurate*. The Court merely asked the 1st Defendant through interpreter when the Court was informed that the 1st Defendant elected to remain silent. Whether he knew what he was doing — namely by electing to remain silent. …

DPP: That was what I was informed.

Karpal: I agree the Court merely asked the 1st Defendant whether he was aware of what he was doing.

Encik Hullon: I confirm.

(Emphasis added.)

[11] This clarification by the learned trial judge, as the notes disclosed, seems to be as a result of a wrong report in the press. The judge was clarifying the error that appeared in the media after the last adjournment probably on 4 February 1999. The notes are not too clear on this.

[12] Counsel urged us to infer from the underlined words that what the court meant was that it was wholly erroneous and also inaccurate to say that if the accused remain silent it would amount to admission. According to him, his client could have been made to understand that he would not be found guilty and be convicted if he chose to remain silent. This is obviously contrary to what the law is.

[13] Counsel also submitted that when the judge said that he was obliged to convict once the accused chose to remain silent, it made his right to remain silent illusory and of no consequence. According to him, the accused was not explained the implications of remaining silent.

[14] It is trite that notes of evidence recorded by a judge in his own hand writing is seldom done verbatim. Such notes are not meant to be a detailed recording. That is why they are called notes. They are a summary to reflect what had taken place in court during the proceedings. Each individual judge decides what is to be written and what is to be omitted. He decides on relevancy as well as the manner it is to be recorded. Under the present practice, he is the only person responsible for the corrections of the notes. Inadvertently, sentences may not be complete, spellings may be wrong, capital letters may appear at the wrong places and a sentence may not be correctly punctuated. The notes must be read in total. Notes taken down by a trial judge must necessarily be read in the context of the complete record of proceedings. Sentences must not be read out of context. But they must be accepted as final and correct unless parties can prove otherwise. It must be so because otherwise there will continue to be disputes as to whether the trial judge had properly and correctly recorded the proceedings. The burden of proving that it is not properly recorded must necessarily fall on the party who claims that the notes are wrongly recorded.

[15] In the case of *Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh* [1997] 2 MLJ 373; [1997] 3 CLJ 225, Gopal Sri Ram JCA had said the following:

> So far as procedure is concerned, we need look no further than the decision of the Singapore Court of Appeal in *Chan Kok Liang v Tan Swan Cheng & Anor* [1970] 2 MLJ 253, cited to us by Encik Joginder Singh. There, Wee Chong Jin CJ said (at p 254):
>
> > It is not the practice of the courts in Singapore (and we add that the same may be said of courts in Malaysia) to have a verbatim shorthand note taken of the entire proceedings in court. If it is intended that any note taken by counsel at the trial of an action be accepted as part of the notes of evidence for use by an appellate court, it is desirable that the trial judge and counsel for the other party or parties should be supplied at the earliest possible opportunity with a copy of the note so made for correction or acceptance or otherwise. If the trial judge and counsel for all parties agree to the original or a corrected version then such agreed original or corrected version can properly be included in the record of appeal as part of the notes of evidence. Where no version can be so agreed, then in any application for leave to include the note made or taken by counsel at the trial, the affidavit in support of the application ought to set out the circumstances under which the note was made or taken and the steps taken to obtain the agreement of all concerned together with all correspondence relating to the attempt to obtain such agreement.

[16] For this present case, no request or attempt had been made to correct or clarify the notes of evidence and therefore, they have to be accepted as correctly recorded by the learned judge. I therefore have to interpret the meanings from just what appear in the notes of evidence.

[17] The learned DPP on the other hand correctly asked us to look at other parts of the notes of evidence. He pointed out that the prosecution's case was closed on 4 November 1997 and did not continue until 15 March 1999, a lapse of over 1 year. The incident mentioned in the notes of evidence took place on 9 March 1999. Between 4 November 1997 and 15 March 1999, the case could not proceed because of several reasons, the most important being that counsel representing the first appellant was not getting proper instructions, as result of which he had to discharge himself. In addition to the two counsels there was in fact another counsel appointed but who apart from mentioning the case on one day, otherwise never acted for him at all. In short, during the trial the first appellant was represented by there different counsel.

[18] On 4 February 1999 at p 198 this is what appears:

> Mahkamah: *3 alternatives again explained to both accuseds.*

Gurmit: *I have instruction to inform that my client wish to remain silent* and would not be calling any witnesses.

Karpal:

My client would give evidence on oath. I believe I can close my case on 9 February 1999.

Mahkamah:

9 February 1999

(Emphasis added.)

[19] On 15 March 1999 the notes of evidence reflect as follows:

Kes untuk defence.

Miss Chan reads the 3 alternatives to OKT1 and OKT2.

Miss Chan inform that OKT1 (Tan Kim Ho) elects to remain silent.

Miss Chan inform that OKT2 (Ho Jin Lock) elects to give his evidence on oath.

Encik Gurmit: I (sic) also not calling any evidence. I am closing my case. I have nothing else to add.

Mahkamah: *Court enquire from Gurmit if he has also explained it to the accused 1 the 3 alternative. (sic)*

Encik Gurmit:

I have.

...

Gurmit:

Right to silence is a constitutional right. Guilt could not be inferred from silence.

Karpal:

I have a comment on *Arulpragasan* at p 408. Even if the accused remains silent, the court may choose to re-evaluate the prosecution case. The court is not functus. The words 'must' in p 408 at para 5 must not mean that the court must convict even if the court is of belief that the defence was wrongly called.

Gurmit:

I am grateful for Mr. Karpal's comment on silence and witnesses silence would mean automatic conviction.

(Emphasis added.)

[20] Section 272 of the Criminal Procedure Code provides 'In all criminal cases tried before the High Court the judge shall take down in writing notes

of the evidence adduced'. Reading from all the notes of evidence and the grounds of judgment, I am well satisfied that the first appellant was properly advised on his rights as well as on the effect of choosing to remain silent. The notes show that not only were the appellants advised by the court but they were represented by able and experienced counsel. The duty to advise the accused person when he is represented by a counsel also lies with the counsel, not merely the court. From the notes of evidence appearing on p 202 counsel for the second appellant agreed that the court merely asked the first appellant whether he was aware of what he was doing. I am fully confident that if the learned trial judge had wrongly advised the appellants of their rights and the implications of them electing to remain silent, a senior and very experienced counsel such as that representing the second appellant, would have definitely advised and pointed out the errors to the learned judge accordingly. He would have failed in his duty as an officer of the court should he have not done so. A lawyer is first an officer of the court. He is obligated to advise the court on what he understands to be the law. In this respect, this is what Lord Reid said in *Rondel v Worsley* [1969] 1 AC 191 at p 227:

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. *But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public*, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. And by so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him.
>
> (Emphasis added.)

[21] Counsel for the second appellant had acted and been involved in so many criminal cases involving new principles in criminal law including cases relating to the burden of proof at the close of the prosecution's case (see *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265).

[22] In any case, further, the first appellant's own counsel confirmed that the first appellant elected to remain silent, not on one occasion, but on three different occasions during the trial.

[23] There is nothing in the grounds of judgment to indicate that the judge had erred in law on the rights of the appellants to the three choices at the close of the prosecution case. His grounds of judgment clearly indicate that he correctly directed himself on the burden of the prosecution at the close of

the prosecution's case. He correctly applied the law, particularly the decisions of *Khoo Hi Chiang* and *Arulpragasan*. He said in his judgment:

> At the close of the close of the prosecution case, the court was totally convinced, after a maximum evaluation of the prosecution evidence on the guidelines laid down in *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265 and affirmed in *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1; [1997] 1 AMR 329, that the prosecution (even without Edmund's dock identification of OKT1 and OKT2 which was not given weight) had made out a beyond reasonable doubt case against OKT1 and a beyond reasonable case against OKT2, which if unrebutted would warrant his/their conviction. Accordingly, both OKT1 and OKT2 were called to enter on their defence.
>
> Trial only resumed after a long lull, as OKT1 was without counsel after his defence was called. When trial eventually resumed, OKT1 elected to remain silent, yes, OKT1 elected to remain silent, notwithstanding that the fact that prosecution had made out a case on beyond reasonable doubt evidence which if unrebutted would warrant his conviction. In *PP v Goh Kim Looi* [1994] 2 AMR 1381, Vincent Ng JC (as he then was) remarked: 'this new position (the maximum evaluation of the prosecution case) would justify automatic conviction of the accused should he remain silent'. And in *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 at p 48; [1997] 1 AMR 329 at p 408, the Federal Court per Edgar Joseph Jr SCJ said, 'if, upon the defence being called (after a maximum evaluation of the prosecution case] the accused elects to remain silent and calls no evidence then, the court must convict' Mr Gurmit, who conducted OKT1's defence after OKT1 was ordered to enter his defence, submitted — and that was all he submitted — that OKT1's silence was his undoubted right, that his silence was not an admission of guilt and that the actual gun must be produced. Shoring that ethereal submission for his learned friend, Mr Karpal gratuitously commented that 'must convict' does not mean that a court must convict even if the court upon reflection is of the belief that the defence was wrongly called.
>
> OKT1's silence was undoubtedly his right. Except unfortunately, with silence, there was and there is nothing to rebut the prosecution case and nothing to cast any reasonable doubt on the prosecution case. And also unfortunately the production of the actual gun is not essential for a successful prosecution of a s 3 offence (see *PP v Ong Poh Cheng* [1996] 1 CLJ 501, affirmed by the Court of Appeal (*Ong Poh Cheng v PP* [1998] 4 MLJ 8) and Federal Court). Ineluctably, as a result, OKT1 has not cast any reasonable doubt on the prosecution case. The prosecution case on beyond reasonable doubt evidence after a maximum evaluation with OKT1's is totally intact. The court is totally convinced that OKT1 is guilty as charged.

[24] I am of the opinion that what the judge meant in his notes was that the report in the media was erroneous and inaccurate and not what he had said in court was erroneous and inaccurate. On this ground of appeal I find that both appellants failed.

[25] Both appellants raised other issues, though not seriously pursued. Nevertheless, I gave careful consideration to these grounds of appeal. Both appellants challenged their identification by the three witnesses.

[26] The grounds raised by the second appellant challenging identification are:

(a) Witnesses had been consuming alcohol and therefore could not have narrated the identity of the accused.

(b) PW6 dock identification: this identification was rejected by the trial court.

(c) Not all witnesses could identify and therefore not much reliance should be placed on those who identified the appellants.

(d) Since witnesses were in extreme fear they could not have been able to remember the faces of the appellants.

(e) Circumstances under which test identification parade was held were undesirable.

(f) Whether there was a David Goh Pok Wah who was wrongly identified as the second appellant.

[27] Grounds (a) to (e) could equally be grounds of appeal by the first appellant.

[28] I find that the learned judge had not committed any error in appreciation of facts relating to grounds (a) to (e). These are all questions of fact. The learned trial judge had dealt with the question of identity at length in his grounds of judgment. These were subsequently re-evaluated by the Court of Appeal. The Court of Appeal found that the learned trial judge had not committed any error in the directions that he gave himself on the issue of identification. At the expense of repetition, the question of identification is a question of fact.

[29] It is an established principle of law that when dealing with finding of facts, the trial judge is more often than not, in a better position to decide. The appellate court must be reluctant to interfere with such findings, unless the facts obviously disclose the courts below had clearly and wrongly evaluated the facts.

[30] In *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1; [2007] 5 CLJ 1 this court held:

The approach to be taken by an appellate court when dealing with a trial court's assessment of credibility of witness is well-established by high authorities. The credibility of a witness is primarily for the trial judge. An appellate court should always be slow in disturbing such finding of fact arrived at by the judge who had audio-visual advantage of the witness, unless there are substantial and compelling reasons for disagreeing with the finding. Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. It would be wrong to say just because a witness may have contradicted in his evidence or even told lies on one or two points, his evidence should be totally rejected. In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject (see *Herchun Singh & Ors v Public Prosecutor* [1969] 1 LNS 52; [1969] 2 MLJ 209, FC; *Dato' Mokhtar Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ (Rep) 101, FC; *Lai Kim Hon & Ors v Public Prosecutor* [1980] 1 LNS 197; [1981] 1 MLJ 84, FC; *Che Omar bin Mohd Akhir v Public Prosecutor* [1999] 2 MLJ 689; [1999] 2 CLJ 780 CA). It is not the function of an appellate court to make primary findings of facts (see *Public Prosecutor v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203; [2006] 1 CLJ 457, FC).

[31] Regarding ground (f) ie as to whether it was David who was with the first appellant and not the second appellant, the learned judge had rightly considered that the name David was only first raised by counsel during the second appellant's testimony. The learned trial judge had also correctly held that the claim by the second appellant that he walked out of the bar of the lounge before the shooting and that David walked in instead was never raised during the prosecution's case by either of the appellants.

[32] The learned DPP Mr Wong Chiang Kiat submitted that this is bare assertion by the second appellant as it was never put to any of the prosecution's witnesses.

[33] In our adversarial system of justice, the duty of each party is to show that his case is the truth. This is done by him adducing his own witnesses to support his contention. When it is the plaintiff or prosecutor who is adducing the evidence, his witnesses are subject to cross-examination by the defence or the accused person. When a prosecution witness makes a statement of fact which is disagreed to by the defence it becomes the defence's duty to, in whatever way, put to the plaintiff or prosecution witness that what the witness has said is not true. In addition, he could also use the plaintiff's or prosecution's witnesses to adduce evidence to support his defence and to indicate what his defence is. This he is required to do to enable the plaintiff or prosecution to bring out evidence to disprove what the defence intends to adduce. If the defence does not in any way indicate by cross-examination of those facts, those statements made by the plaintiff's or prosecution's witnesses must be accepted as true. Even if the plaintiff's or prosecution's witness does

not say anything relating to the defence case, it is still the duty of the defence to bring out his case during the plaintiff's or prosecution's case. In fact this duty to disclose his defence during the prosecution's case is more relevant in criminal cases than in civil. This is particularly so when the plaintiff or prosecution's witness is relevant to the fact in issue. In criminal cases, the prosecution does not know what the defence is going to be, except in alibi, until the defence adduces its evidence.

[34] The failure of a party to put questions to his opponent's material witnesses in cross-examination is said by Gopal Sri Ram JCA in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 to be an abandonment of the pleaded case and may be barred from raising it in argument thereafter. On this point, both cases of *Chua Beow Huat v Public Prosecutor* and *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* agreed with the decision of the House of Lords in *Browne v Dunn* (1893) 6 R 67 and quoted Lord Herschell (at p 70) as follows:

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit.
>
> My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him, and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

[35] Lord Halsbury's description of the situation of failure to examine a witness during the plaintiff or prosecution's case as a 'perfect outrage' (at p 77). Lord Halsbury said in the same case (at pp 76–77):

> My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to. My Lords, it seems to

me that it would be a *perfect outrage* and violation of the proper conduct of a case at Nisi Prius if, after the learned counsel had declined to cross-examine the witness upon that evidence, it is not to be taken as a fact that that witness did complain of the plaintiff's proceedings, that he did receive advice, that he went round to Mr Dunn as a solicitor, and that he did sign that retainer, the whole case on the other side being that the retainer was a mere counterfeit proceeding and not a genuine retainer at all.

(Emphasis added.)

[36] This is however not to say that there is any burden placed on the accused to disprove any guilt or to prove innocence. It is only assessing the credibility of a witness, in this case the second appellant's credibility. In order to determine whether an accused was telling the truth, one of the consideration is whether he had indicated his defence during the prosecution's case. In this respect the learned judge had properly and correctly considered and rejected the claim by the second appellant that he had walked out of the lounge and David walked in. He said in his judgment:

... And surely, one witness at least at the scene would have seen — if it was true that OKT2 walked out from the lounge and David (even if mistaken for OKT2) entered the lounge after OKT2 walked out from the lounge — one of the two men who entered the lounge at 2am walking out of the lounge. At least one witness at the scene would have seen David or a third party entering the lounge. Also, OKT2 would not have not put his case, because it was so crucial to his case, that he had walked out of the lounge. But there is no evidence of David's presence and there is no evidence even remotely supporting David's presence at or about the vicinity of the scene of the crime at or about the time of the commission of the crimes. As against the weight of the unchallenged evidence on the entire sequence of events inside the lounge that not one of the two men who entered the lounge left the lounge until after the robbery and shooting, there is only the word of OKT2 who had been keeping his defence 'up his sleeve' that he walked out of the lounge before the commission of the crimes and that David walked into the lounge after he walked out from the lounge. Surely, it is evident that David's alleged role was an invention and an afterthought.

[37] There was nothing in the evidence to indicate that David entered the lounge after the second appellant walked out. The learned DPP rightly submitted that it is therefore irrelevant whether David was called or not as a witness. There was nothing in the prosecution's case to indicate that the non-calling or offering of David to the defence could have undermined the prosecution's case. David was not even a witness necessary for unravelling the prosecution's case and therefore could not be deemed as a material witness for their case. The defence cannot invoke s 114(g) of the Evidence Act. As Mohamed Azmi SCJ said in the case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 at p 494:

> ... Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[38] The second appellant's claim that the person whom the witnesses identified as the second appellant was in fact David, cannot also be accepted for reasons that all the three witnesses clearly and confidently identified the first and second appellants. They had seen the faces of these two persons clearly. The lights had been turned on.

[39] The learned judge properly considered and evaluated all the evidence before him and was right in concluding that the two appellants were correctly identified.

[40] According to learned counsel for the second appellant, as I understand it, if his alibi is rejected then the appellant would be left with no defence for him. He concluded that the Court of Appeal should not have considered the prosecution's evidence at all. He sought an order for retrial. The Court of Appeal in fact ruled that on the facts of this case, the issue of alibi does not arise because the charge against the second appellant was that the offence was committed at Hot Lips Lounge. Obviously, where a defence raised by the accused during the defence case is rejected outright by the court the accused would therefore be without a defence. In the light of my findings I think this issue as to whether the offence was committed 'in' or 'at' Hot Lips Lounge (as discussed by the Court of Appeal) is not relevant to this appeal.

[41] Bearing in mind that I am satisfied as to the identity of the second appellant, his claim that he was outside the lounge is obviously untrue.

[42] In conclusion, therefore, I dismiss both appeals and affirm the convictions and sentences by the High Court and the Court of Appeal against both first and second apellants.

[43] My learned brother Hashim Dato' Hj Yusoff FCJ has read this judgment in draft and he concurs with me.

Abdul Aziz Mohamad FCJ:

[44] The appellants were tried jointly at the High Court, the first appellant for an offence under s 3 of the Firearms (Increased Penalties) Act 1971, and the second appellant for an offence under s 3A of that act. They were

convicted and sentenced to death. The Court of Appeal dismissed their appeals. They now appeal to this court.

[45] Sections 3 and 3A of the Act provide, so far as material for the purposes of this judgment, as follows:

> 3 Any person who at the time of his committing... a scheduled offence discharges a firearm with intent to cause death or hurt to any person, shall … be punished with death.
>
> 3A Where, with intent to cause death or hurt to any person, a firearm is discharged by any person at the time of his committing … a scheduled offence, each of his accomplices in respect of the offence present at the scene of the commission … thereof who may reasonably be presumed to have known that such person was carrying or had in his possession or under his custody or control the firearm shall … be punished with death …

Robbery is a scheduled offence.

[46] By the evidence of witnesses present at the time of the incident, the learned trial judge found the prosecution had established certain facts, of which I need only state the following for the purposes of this judgment. At 11.30pm on 4 August 1992 six young professionals were seated together at a table at one end of the lounge of a public bar called the Hot Lips Lounge in Georgetown, Penang. At 12.30am next day there was an argument followed by a fight between two groups, one of two persons, the other of seven persons. One of them was injured above an eyebrow. They finally left the premises. At 2.30am there remained only the six young professionals in the lounge, besides the proprietor and his partner, Lee Kum Weng. Then the two persons who had fought with the group of seven came back to the lounge. One wore spectacles. The other had a surgical plaster over the left eyebrow. The bespectacled man hit Lee repeatedly with a crash helmet. The man with the surgical plaster pulled out a gun and after asking certain questions of two of the six customers, Ramesh and Edmund, shot Edmund, who suffered serious head injuries but did not die. The gunman ordered the six to take out their belongings. They complied and placed their wallets on the table. The bespectacled man collected the wallets and also snatched off the gold necklaces that two others of the six were wearing. The bespectacled man wanted to smash an empty glass on Edmund's head but missed. Obeying the gunman's order, the six positioned themselves with their knees and heads to the floor. Another shot was heard and the two men were heard leaving. Ramesh was found lying dead on the floor. The gunman was the first appellant. The bespectacled man was the second appellant.

[47] What is important to note from the facts as found, and that is for the purposes of the second appellant's appeal, is that it was the same two persons who entered the lounge at 2.30am and did what they did and left the lounge after that, that they were the two appellants, and that during that time, when the only other people in the lounge were the party of six and the two partners, the two appellants were always together and no one else entered the lounge.

[48] When their turn came to present their defences, the first appellant chose to remain silent but the second appellant gave evidence on oath, after which the appellants were convicted.

[49] I will consider the appeal of the second appellant first. It requires a consideration of his evidence. I will state it sketchily and so far only as relevant to the point arising in his appeal. Between 11.30pm on 4 August and midnight, he and the first appellant and one David Goh arrived at the lounge and started drinking. The first appellant was attacked by eight or nine persons, who finally left. The first appellant and company also left. The second appellant took the first appellant, who was injured above the left eyebrow, to a clinic, where the wound was attended to, after which the second appellant applied a surgical plaster to it. They later gathered at David's house, where David and the first appellant decided to look for one Ah Goo. So they went back to the lounge on motorcycles. The two appellants entered the lounge about 2am but did not find Ah Goo. At about 2.10am the first appellant went to talk to the group of six professionals while the second appellant, who was at the counter, left the lounge and told David, who was outside the lounge, that Ah Goo was not in the lounge. David then entered the lounge after telling the second appellant to remain outside. After about ten minutes David and the first appellant left the lounge in a state of confusion (kelam-kabut). All three went back to David's house, from which the second appellant left for his home.

[50] According to the learned trial judge, the defence of the second appellant was that he was not inside the lounge at the time of the robbery and shooting and that he had been mistakenly identified as the man who was inside the lounge then, when it was David Goh. The learned trial judge said that the second appellant's defence that he was not inside the lounge at the crucial time smacked of an alibi. The learned trial judge ruled that since the notice required by s 402A of the Criminal Procedure Code had not been given, the evidence that the second appellant was outside the lounge at the crucial time, which the judge found was the evidence in support of the defence of alibi, must be excluded, but that there still remained to be considered the defence of mistaken identity, which the judge said was the

defence that it was David who was inside the lounge at the crucial time, having entered it after the second appellant had left it, and who was mistaken for the second appellant.

[51] The learned trial judge found that although it was established that David was not a fictitious character — that there existed a man by the name of David Goh Pok Wah who had responded to the call of the police to assist them in their investigation of this case — the second appellant's allegation of the role played by David was an invention. That was because, apart from the second appellant's testimony, there was no other evidence of David's involvement, whereas the evidence for the prosecution was that two people — who even according to the second appellant were he himself and the first appellant — entered the lounge and were there throughout until they left after the robbery and the shooting, and that evidence had gone unchallenged in cross-examination. The learned trial judge was sure that if, as alleged by the second appellant, one of the two persons who entered the lounge together left it afterwards before the robbery and the shooting, and then one person, whether one of the two or another, came in, at least one of the prosecution witnesses who were in the lounge would have noticed it and mentioned it in evidence.

[52] The Court of Appeal did not, in their judgment, clearly evince their appreciation that the learned trial judge had viewed the second appellant's defence as being twofold, namely, alibi and mistaken identity. Paragraphs 4 and 5 of their judgment leave the impression that they understood the second appellant's defence to be one of alibi only. They concluded that the learned trial judge had misdirected himself in regarding the defence as one of alibi because, to constitute the defence of alibi, the plea must be one of not being present at the scene a 'the time of the incident, whereas the second appellant was present at the scene, which was the Hot Lips Lounge, even though, as he claimed, he was not inside it but was outside it. The Court of Appeal, however, found that no substantial miscarriage of justice was occasioned by the misdirection because the learned trial judge 'nevertheless went on to consider in depth the second defendant's defence in its entirety …' and that accordingly it was an appropriate case to apply the proviso to s 60 of the Courts of Judicature Act 1964, which provides that 'the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred'. If the Court of Appeal had had in mind that what the learned trial judge went on to consider after excluding the evidence in support of the defence of alibi, namely the evidence that the second appellant was outside the lounge, was the defence of mistaken identity, there would have been no necessity to apply the principle of no substantial of miscarriage of justice in the proviso to s 60.

[53] In the appeal before us, the main point submitted on by the second appellant's counsel, Mr Karpal Singh, was the alibi point. But I was not confident that I fully grasped his line of argument. Among other things he said that having found that the learned trial judge had misdirected himself in finding that the defence of the second appellant was one of alibi, the Court of Appeal should not have gone to the rescue of the learned trial judge by resorting to the proviso to s 60 of the Courts of Judicature Act 1964 because the proviso should be applied only in exceptional cases, and he cited three authorities in support of that contention. It might appear that Mr Karpal Singh thought that the Court of Appeal regarded the learned trial judge as having found that the entire defence of the second appellant was one of alibi and that he agreed with the finding of the Court of Appeal that it was not a defence of alibi and that he was contending that with the finding that the learned trial judge had misdirected himself on that point, the Court of Appeal should have ordered a retrial and not resorted to the proviso to s 60 to approve of the learned trial judge's undertaking of a consideration of the second appellant's testimony in his defence. I should have thought that if the learned trial judge had regarded the whole defence as one of alibi, then the consequence of the finding by the Court of Appeal that it was not a defence of alibi would be that the evidence in support of the defence was not inadmissible by reason of absence of notice under s 402A of the Criminal Procedure Code, and the learned trial judge was right after all in considering the evidence. There would have been no necessity to resort to s 60. The position would have been as if the learned trial judge had said that in case he erred in holding that the defence was one of alibi and the evidence was inadmissible because of the absence of notice, he would nevertheless proceed to consider the evidence. There would then have been no necessity for the Court of Appeal to resort to the proviso to s 60 to find that there was no substantial miscarriage of justice in the erroneous finding that the defence was one of alibi. Resort to the proviso would have been appropriate if the judge, on the basis that the defence was one of alibi, had refused to consider the evidence in support of it because it was inadmissible for absence of the s 402A notice and had convicted the second appellant by reason that there was no admissible evidence in his defence. Then the Court of Appeal would have appropriately resorted to the proviso by themselves looking at the defence evidence that the trial judge had refrained from considering, and finding that after all there was no substantial miscarriage of justice in the trial judge's failure to consider the defence evidence because, even if he had done so, in the Court of Appeal's assessment of the evidence he would not have found in favour of the defence.

[54] As I was not sure that I fully understood Mr Karpal Singh's line of argument on the alibi question, and believing that if a submission were reduced into writing great care would be taken to present and develop the argument with clarity and logic and counsel would not be able to say

afterwards that he did not say what the court thought he said, I asked Mr Karpal Singh to reduce his oral submission into writing. This he did three weeks after the hearing in court of the appeal.

[55] In that written submission, after stating that the requirement of giving notice of alibi pursuant to s 402A is mandatory and citing related cases, Mr Karpal Singh says as follows (and I affirm that the first paragraph, which is cast in language that is difficult to follow, is exactly as in the original):

> Clearly, the Court of Appeal was wrong in, after having rejected the second appellant's evidence that he was outside the Hot Lips lounge being an alibi, could not have lawfully having in mind that no notice of alibi had been given under the provisions of s 402A of the Criminal Procedure Code have appreciated what it had rejected for want of giving notice of alibi under s 402A.
>
> With respect, the learned judges of the Court of Appeal were wrong in holding that the learned trial judge had in fact considered the defence of the second appellant, which he could not have, because of the contravention of s 402A.
>
> With respect, having regard to the circumstances, the Court of Appeal should have held that the second appellant had been deprived by the trial judge of putting up a defence which was a fundamental and substantial defect in the administration of law. Such defect was incurable.
>
> The second appellant's appeal ought to have been allowed on this score without invoking the proviso to s 60(1) of the Courts of Judicature Act 1964. The Court of Appeal was therefore wrong in concluding:
>
> > This is accordingly an appropriate case to apply the proviso to s 60(1) of the Courts of Judicature Act 1964 (see *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381).
>
> The second appellant's appeal should be allowed by this Honourable (court) and the sentence of death imposed on him by the High Court and confirmed by the Court of Appeal ought to be set aside and the second appellant be acquitted and discharged.

[56] And that is all. There are absent the submission about the exceptional circumstances justifying resort to the proviso to s 60 and the three authorities in support of it. The gist of Mr Karpal Singh's submission now seems to be that the Court of Appeal should have found that the trial was incurably defective because the learned trial judge, by failing to consider the second appellant's defence, had deprived him of his right to put up a defence. The reason why Mr Karpal Singh submits that the learned trial judge *had not considered* the defence is a perverse one, namely, that the learned judge *could not have considered* the defence, having held that the evidence in support of it was inadmissible by reason of non-compliance with the requirement of notice of s 402A.

[57] The submission is clearly devoid of merit. Even if the entire defence of the second appellant was one of alibi, the learned trial judge did in fact consider it. But in truth the judge viewed the defence of alibi as confined only to the second appellant's evidence that he was outside the lounge during the crucial ten minutes. It was that evidence only that the learned trial judge treated as inadmissible and did not consider by reason of s 402A, but having considered and rejected the other defence, that of mistaken identity, he could not have accepted the alibi evidence even if he had considered it. The two defences went hand-in-hand. If one failed the other must fail. As the judge, after considering the defence of mistaken identity, still accepted the evidence for the prosecution that it was the second appellant who was in the lounge with the first appellant during the crucial space of time, he could not have accepted that the second appellant was outside the lounge during that time.

[58] Mr Karpal Singh also submitted orally in court on points in the first appellant's appeal, on the plea that the outcome of the first appellant's appeal would also affect the position of the second appellant, but I will deal with the points in the first appellant's appeal when I come to it shortly.

[59] Before the hearing of the appeals, Mr Karpal Singh had also prepared a written submission in which he submitted on the evidence of identification of the second appellant, giving reasons for contending that the identification was unsafe; on the learned trial judge's remarking that the second appellant did not put at the earliest stage, by cross-examination of the prosecution witnesses, his case that before the crucial space of time he had left the lounge and David Goh had come in; and on the prosecution's failure to call David Goh to testify during the trial. Mr Karpal Singh did not raise these points in his oral submission but, after submitting on the alibi question, said that he was not abandoning them. I thought that it was an indication of a realisation that those were not strong points and in any case I find no merit in them.

[60] I turn now to the first appellant's appeal. In his written submission, the first appellant's counsel, Mr Jagdeep Singh Deo, raised three points. He submitted orally during the hearing of the appeal on only two points and after that he said, as regards the other point, which was about the evidence of identification of his client being unsafe, that it was not his 'strongest' point because there had been concurrent findings on identification by the High Court and the Court of Appeal. For my own part, I find there is no merit in it.

[61] The two points that were submitted on orally are about the right to remain silent and failure to explain the consequences of remaining silent. Encik Jagdeep Singh first submitted on the right to remain silent, and when he came to submit on the other point he said that that was the real point,

thereby impliedly acknowledging that the point about the right to remain silent was not a real point, as indeed it is not, but I will say something about it.

[62] Mr Jagdeep Singh's point about the right to remain silent is that it is a substantive right, and if, upon exercise of the right, conviction follows automatically, that is a denial of the right. Therefore upon the first appellant exercising his right to remain silent the court should have re-evaluated the evidence for the prosecution.

[63] That is illogical and farcical. In the first place, the right to remain silent is a right to something of a negative nature, a right not to do anything. Logically such a right can only be said to be denied if the person is compelled to do something, in this case if the first appellant was compelled to say something. But he was allowed his right. He was not compelled to say anything. That the consequence of the right to remain silent is automatic conviction cannot, logically, be a denial of the right to remain silent. The position cannot be compared with the right to give an unsworn statement from the dock, which was considered in *Mohamed Salleh v Public Prosecutor* [1969] 1 MLJ 104, and which Mr Jagdeep Singh relies on for his point about the right to remain silent. The right to give an unsworn statement is a right to a positive thing. That is a right to do something, to make one's defence in a particular manner. It is logical that it would amount to a denial of that right if the court were to refuse to consider the statement on the ground that its veracity could not be tested by cross-examination.

[64] In the second place, by s 180 of the Criminal Procedure Code, what the court is required to find at the conclusion of the case for the prosecution is whether a case has been made out against the accused 'which if unrebutted … would warrant a conviction'. To put it another way, the court is required to find whether or not the prosecution has made out a case against the accused which would warrant his conviction, if unrebutted. Therefore upon finding that the prosecution has made out such a case, but there is no evidence or there is going to be no evidence in rebuttal, conviction is warranted and must follow. In this case the judge said that the prosecution 'had made out a beyond reasonable doubt case (against each appellant) which if unrebutted would warrant his conviction'. That finding was made after the first appellant's counsel must have done his utmost to persuade the court that the prosecution had not made out such a case and after the learned trial judge had, as he said, done a maximum evaluation of the evidence for the prosecution but was not so persuaded. As it happened, this case involved two accused, and the first appellant was convicted after the court had heard the evidence of the second appellant, but if this were a case involving only one accused, as a lot of criminal cases do, it would be expecting a farce to expect

the trial judge, after all that has been done that I have mentioned, and with nothing more happening after that except the accused electing to remain silent, to postpone the trial, return to his chambers to re-evaluate the evidence and come back to court and say that the prosecution has not, after all, made out a case to warrant his conviction.

[65] I turn now to Encik Jagdeep Singh's real point, namely, the contention that the consequences of remaining silent were not explained to his client. For this, it is necessary to set out the relevant events in the trial. On 4 November 1997, after hearing submissions following the conclusion of the prosecution's case and undoubtedly after finding — though this was not recorded in the notes of proceedings — that the prosecution had made out a case against both the appellants to warrant their conviction, the learned trial judge asked whether the appellants were ready to enter upon their defence. Several adjournments followed and during this period Mr Harpal Singh was discharged as the first appellant's counsel at the former's request and Mr Gurmit Singh was retained in his place.

[66] On 4 February 1999, more than a year after the learned judge asked whether the appellants were ready to enter upon their defence, Mr Gurmit Singh, after the three alternatives were explained to the appellants, informed the court that his client wished to remain silent and would not be calling any witnesses. Several more adjournments followed. Then on 9 March 1999 the learned trial judge explained in open court that on the previous occasion, which must have been on 4 February 1999, he had merely asked the first appellant whether he knew what he was doing by electing to remain silent and that he did not say, as reported in the press, that the court could deem silence as an admission of guilt. Mr Gurmit Singh, the first appellant's counsel, Mr Karpal Singh, the second appellant's counsel, and the learned DPP all then agreed that what had happened on the previous occasion was as the judge explained.

[67] On 15 March 1999, the three alternatives were again made known to the appellants. The first appellant still elected to remain silent and his counsel, Mr Gurmit Singh, informed the court that he was not calling any evidence. The learned trial judge then asked Mr Gurmit Singh if he had explained the three alternatives to his client, and Mr Gurmit Singh confirmed that he had.

[68] The first appellant was convicted along with the second appellant on 31 July 1999 after the judge had heard submissions after the conclusion of the testimony of the second appellant.

[69] It is clear from those events that although there is no record that the learned trial judge or the interpreter had informed the first appellant of the consequences of remaining silent, his counsel would have done so. In particular, on 15 March 1999, when the learned trial judge asked Mr Gurmit Singh whether he had explained the three alternatives to his client, the judge must have meant, and Mr Gurmit Singh, when he replied in the affirmative, must have understood the judge to mean, whether he had explained the consequences of choosing any one of the three alternatives. The judge could not have meant to satisfy himself merely that the first appellant knew what the three alternatives were, because this had already been made known to him a few moments earlier. In any case, this being a capital charge, the first appellant's decision to remain silent would have been made after consultation with his counsel and it cannot be supposed that his counsel did not inform him of the consequences of remaining silent.

[70] Mr Jagdeep Singh submitted that the first appellant chose to remain silent as a result of the clarification made by the judge on 9 March 1999. That is not correct. The clarification was about what the judge said on 4 February 1999 after the court was informed on that day by Mr Gurmit Singh that his client wished to remain silent. The first appellant had decided to remain silent even before the clarification.

[71] For the reasons that I have given I would dismiss both the appellants' appeals and confirm their convictions and the sentences imposed upon them.

Appeals dismissed. Convictions and sentences affirmed.

Reported by K Nesan